MALAYAN BANKING BHD

v.

BASARUDIN AHMAD KHAN

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-02-59-2002]
23 AUGUST 2004

CONTRACT: *Employment contract - Breach - Employee promised to pay and make good loss as a result of breach - Whether promise made an indemnity or warranty - Whether employer's right to indemnity failed as losses not proved - Contracts Act 1950, ss. 74, 77*

CIVIL PROCEDURE: *Appeal - Failure to obtain leave to appeal - Whether subject matter was below limit fixed by s. 68 Courts of Judicature Act 1964 - Whether value of claim should be viewed from appellant's standpoint - Whether failure to obtain leave not fatal to appeal*

The defendant (the respondent herein) was employed as a manager of a branch of the plaintiff bank (the appellant herein). Upon his engagement with the plaintiff, the defendant executed a fidelity contract in which he promised, amongst other things, the following "… to the best of my skill and ability perform all duties which may be required of me, …" and "… that I will on demand pay and make good to the Bank the amount of all loss, damage and expense which may be sustained or incurred by the Bank …". It was the plaintiff's case that the defendant committed three breaches of his contractual duty. Firstly, that he approved loans for joint borrowers who were not family members when there was a standing instruction that he was not to do so. Secondly, that he failed to comply with the condition that the limit of a loan should be gradually reduced. Thirdly, that he breached his implied contractual duty of care and skill by grossly over valuing property offered by customers as collateral to loans advanced by the plaintiff. The plaintiff also claimed that it had failed in its efforts to recover the loans advanced in consequence of the defendant's breach of duty. The learned judge found that the defendant was in breach of contract but nevertheless dismissed the plaintiff's claim on the ground that it had not proved its losses. Hence the plaintiff's appeal to this court.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA (majority):

[1] The relationship between an employer and an employee is one founded on contract. It is subject to the general principles governing the implication of a term in a contract. A term will not be implied if there is no necessity to do so and the test of necessity is not met where the contract already contains a clear express stipulation to the effect as that sought to be implied. In the present case, there was an express promise in terms of the one that the plaintiff sought to have implied. The defendant had expressly promised that he would to the best of his skill and ability perform all duties that might be required of him. There was therefore no necessity to imply a term to the identical effect. (p 604 a-e)

[2] In the case of a promise that is a warranty, a breach thereof gives rise to a right in damages as an incident of the contract. In other words, a duty of the promisor to perform the primary obligations under the particular contract is by implication of law substituted with a duty to pay damages *in lieu* of such performance. Liability for breach is therefore strict and is not dependent upon proof of fault or damage. The innocent party is, subject to the rules as to remoteness, entitled to recover damages from the contract breaker. Even if the innocent party has in fact suffered no damages, it is entitled to recover at least nominal damages. Whereas in a contract of indemnity, one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. In consequence a promisee in a contract of indemnity must prove that he or she has suffered loss before he or she may succeed. In other words, loss is an essential ingredient of the cause of action for indemnity whereas it is not so in an action for the breach of a warranty. (pp 604 h & 605 a-d)

[3] The promise made by the defendant as against the definition in s. 77 Contracts Act 1950 ('CA') clearly showed that the defendant promised to save the plaintiff from loss caused to the plaintiff by the conduct of the defendant. This was a right to indemnity given by the contract and not a mere right to damages. Accordingly, the defendant's promise was an indemnity. Therefore, it was imperative for the plaintiff to prove that it suffered losses alleged in its pleaded case. It was common ground that the plaintiff did not prove its losses. Although both parties agreed the issue of liability to be tried first and the issue of damages to be dealt with later, nevertheless in the course of proving the defendant's liability, it was

incumbent on the plaintiff to establish its loss as an essential ingredient of its cause of action. Once the loss went unproved, the plaintiff's cause of action against the defendant was not established. (pp 607 h & 608 a-d)

[4] The plaintiff's motion to admit the sealed order was a formality and should be allowed. As to the defendant's motion to dismiss the present appeal for failure on the part of the plaintiff to obtain leave to appeal on the ground that the subject matter was below the limit of RM250,000 fixed by s. 68 of the Courts of Judicature Act 1964 was a frivolous application lacking any merit. This was because the value of a claim in the context of s. 68(1)(a) should be viewed from an appellant's standpoint. Here the pleaded value of the plaintiff's claim exceeded the statutory trigger. (p 608 e-f)

Per Abdul Aziz Mohamad JCA (dissenting)

[1] There were essentially two parts to the contract. The first part was a promise by the defendant to serve the plaintiff faithfully. The second part was a promise by the defendant – a-pay-and-make-good promise – to compensate the plaintiff for any loss suffered by it as a result of the defendant's failure to fulfil any of his promises in the first part. If the plaintiff's claim was a right to the indemnity given under the contract then the pay-and-make-good promise was a contract of indemnity as defined in s. 77 CA or it was a promise that made the Employee's Service Agreement a contract of indemnity. However, the plaintiff's claim was not such a claim. It was a claim for breach of contractual duty of care. The plaintiff's cause of action was not on the indemnity but on breach of the defendant's contractual duty of care. The Employee's Service Agreement, but for the fact that it contained an indemnity clause was an ordinary contract in which for a consideration, the defendant made certain promises that amounted to a promise to serve the plaintiff faithfully. A breach of that contract would constitute a cause of action for the plaintiff. To establish liability the plaintiff should not have to prove its loss or damage, the right to which would be a right consequential and incidental to the breach. For that right the plaintiff could rely on the pay-and-make-good promise as an express stipulation of what the defendant would bear in consequence of the breach. Or if it could not rely on that promise it could rely on the consequential right to compensation given by s. 74(1) CA and it might get the same amount of compensation as the indemnity. Furthermore, the plaintiff's statement of claim was framed as a claim for breach of contract and not as a claim of right to the indemnity. (pp 610 h & 611 a-e)

[2] At the commencement of the trial the parties agreed that the issue of liability to be tried first which meant that there was no requirement for proof of loss or damage. This agreement was one of great significance as indicating that the defendant realized and accepted and – correctly too – that the plaintiff's claim was one for breach of contract, the establishment of which did not require proof of loss or damage. The defendant could not while agreeing that his liability, if any, could be established without proof of loss or damage, continue to maintain in his defence that the plaintiff prove loss or damage. (pp 611 g-h & 612 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Defendan (responden di sini) bekerja sebagai seorang pengurus di sebuah cawangan bank plaintif (perayu di sini). Semasa diambil bekerja dengan plaintif, defendan memeterai satu perjanjian kesetiaan di mana beliau antara lain berjanji seperti berikut "... akan melaksanakan dengan sebaik mungkin segala tugas yang diberikan kepada saya ..." dan "... bahawa saya, atas tuntutan, akan membayar balik dan mengganti kepada bank jumlah kehilangan, kerugian atau perbelanjaan yang mungkin dialami atau ditanggung oleh bank ...". Adalah menjadi kes plaintif bahawa defendan telah melakukan tiga kemungkiran terhadap kontraknya itu. Pertama, bahawa beliau telah meluluskan pinjaman kepada peminjam bersama yang tiada kaitan keluarga antara satu sama lain, walaupun terdapat arahan jelas bahawa beliau tidak boleh berbuat demikian. Kedua, bahawa beliau gagal mematuhi syarat bahawa had pinjaman perlu dikurangkan secara beransur-ansur. Ketiga, bahawa beliau melanggar syarat kontrak tersirat untuk bertindak dengan bijak dan secara berjaga-jaga apabila beliau melebih nilai hartanah yang ditawarkan oleh pelanggan sebagai jaminan bagi pinjaman yang diberikan plaintif. Plaintif juga mengatakan bahawa ia telah gagal menuntut balik pinjaman yang diberikan akibat kemungkiran defendan tersebut. Yang arif hakim mendapati bahawa defendan telah memungkiri kontrak, namun telah menolak tuntutan plaintif atas alasan bahawa plaintif gagal membuktikan kerugian. Plaintif dengan itu merayu ke mahkamah ini.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR (majoriti):

[1] Hubungan antara majikan dan pekerja adalah berasaskan kontrak. Ia tertakluk kepada prinsip-prinsip am yang mengawalselia implikasi terma sesuatu kontrak. Sesuatu terma tidak akan disirat jika tiada keperluan untuk berbuat demikian, dan ujian keperluan tidak dipenuhi di mana kontrak sudah pun mengandungi peruntukan jelas tentang perkara yang hendak disiratkan itu. Dalam kes semasa, terdapat janji nyata mengenai apa yang hendak

disiratkan oleh plaintif. Defendan telah secara nyata berjanji bahawa beliau akan dengan sebaik mungkin menjalankan tugas-tugas yang diperlukan darinya. Dengan itu tiada keperluan untuk mensirat sesuatu mengenai perkara tersebut.

[2] Dalam kes di mana janji merupakan satu waranti, kemungkiran terhadapnya menimbulkan hak kepada gantirugi sebagai suatu hal kontrak. Dengan lain perkataan, tanggungjawab seorang penjanji untuk melaksanakan obligasi utamanya di bawah kontrak adalah, secara pensiratan undang-undang, diganti dengan obligasi untuk membayar gantirugi. Liabiliti kerana kemungkiran dengan itu adalah sangat ketat dan tidak bergantung kepada bukti pelanggaran atau kerugian. Pihak yang tidak bersalah, tertakluk kepada peraturan-peraturan berkaitan ketidakdugaan (remoteness), adalah berhak untuk mendapatkan gantirugi dari pelanggar kontrak. Walaupun pihak tidak bersalah itu tidak mengalami sebarang kerugian, ia masih berhak untuk memperoleh gantirugi nominal. Manakala dalam suatu kontrak indemniti, seseorang berjanji untuk melepaskan seorang lain dari kerugian yang diakibatkan oleh kelakuan penjanji sendiri ataupun oleh orang ketiga. Berikutnya, seorang penerima janji dalam suatu kontrak indemniti harus membuktikan bahawa beliau telah mengalami kerugian sebelum boleh mendapat gantirugi. Dengan lain perkataan, kerugian adalah ingredien perlu dalam kausa tindakan indemniti, sedangkan ianya tidak perlu dalam tindakan untuk kemungkiran waranti.

[3] Janji yang dibuat oleh defendan, mengambilkira definasi di s. 77 Akta Kontrak 1950 ('AK') adalah bahawa beliau berjanji untuk melepaskan plaintif dari sebarang kerugian yang diakibatkan kepada plaintif ekoran dari kelakuannya. Ini adalah hak kepada indemniti yang diberikan oleh kontrak, dan bukan semata-mata hak kepada gantirugi. Janji defendan, dengan itu, adalah suatu indemniti. Oleh kerana itu, menjadi tanggungjawab plaintif untuk membuktikan ia telah mengalami kerugian seperti yang dikatakan dalam plidingnya. Adalah diakui bahawa plaintif gagal membuktikan kerugiannya. Walaupun pihak-pihak bersetuju supaya isu liabiliti diputuskan dahulu dan isu gantirugi disentuh kemudian, namun, menjadi kewajipan plaintif, semasa hendak membuktikan liabiliti defendan, untuk membuktikan kerugiannya sebagai satu ingredien kausa tindakannya. Sebaik kerugian gagal dibuktikan, kausa tindakan plaintif terhadap defendan turut menjadi tidak terbukti.

[4] Usul plaintif untuk menerima masuk perintah termeterai hanya satu perkara formaliti dan harus dibenarkan. Berkenaan usul defendan untuk menolak rayuan atas alasan bahawa plaintif gagal mendapat izin untuk merayu kerana nilai halperkara di sini kurang dari RM250,000 sepertimana yang ditetapkan oleh s. 68 Akta Mahkamah Kehakiman 1964, ia adalah satu permohonan yang remeh dan tidak bermerit. Ini kerana nilai tuntutan dalam konteks s. 68 harus dilihat dari perspektif perayu. Di sini, nilai tuntutan plaintif yang diplid melebihi had statutori.

Oleh Abdul Aziz Mohamad HMR (menentang)

[1] Terdapat dua bahagian pada kontrak. Bahagian pertama adalah janji oleh defendan untuk berkhidmat dengan plaintif dengan setia. Bahagian kedua adalah janji oleh defendan – suatu janji untuk membayar – untuk menggantirugi plaintif atas kerugian yang dialami olehnya akibat dari kegagalan defendan untuk menunaikan janjinya dalam bahagian pertama. Sekiranya tuntutan plaintif merupakan suatu hak kepada indemniti yang diberi di bawah kontrak, maka janji untuk membayar adalah suatu kontrak indemniti seperti yang ditakrif oleh s. 77 AK atau ianya adalah suatu janji yang menjadikan Perjanjian Perkhidmatan Pekerja suatu kontrak indemniti. Tuntutan plaintif, bagaimanapun, bukanlah tuntutan sedemikian. Ia adalah tuntutan kerana kemungkiran kewajipan berjaga-jaga. Perjanjian Perkhidmatan Pekerja, jika tidak kerana ia mengandungi fasal indemniti, hanyalah suatu kontrak biasa di mana defendan, bagi suatu balasan, membuat janji-janji yang berupa janji untuk berkhidmat secara setia dengan plaintif. Pelanggaran kontrak tersebut mencetuskan suatu kausa tindakan kepada plaintif. Dan, bagi membuktikan liabiliti, tidaklah perlu bagi plaintif untuk menunjukkan kerugian yang dialami, hak kepada mana adalah merupakan hak konsekuential dan hak iringan kepada kemungkiran. Bagi hak tersebut plaintif boleh bergantung kepada janji untuk membayar dan mengganti sebagai suatu peruntukan nyata tentang apa yang defendan akan tanggung jika berlaku kemungkiran. Atau, jika ia tidak boleh bergantung kepada janji tersebut, ia masih boleh bergantung kepada hak konsekuential kepada pampasan yang diberi oleh s. 74(1) AK dan ia akan mendapat jumlah yang sama seperti pada indemniti. Selain itu, penyata tuntutan plaintif telah dirangka sebagai suatu tuntutan kerana kemungkiran kontrak dan bukannya sebagai tuntutan hak kepada indemniti.

[2] Di awal perbicaraan, pihak-pihak bersetuju supaya isu liabiliti dibicarakan dahulu yang bermakna tiada keperluan untuk membuktikan kerugian atau kehilangan. Persetujuan ini sangat penting kerana ia menunjukkan bahawa defendan menyedari dan menerima bahawa tuntutan plaintif adalah tuntutan kerana kemungkiran kontrak, pembuktian mana tidak memerlukan bukti

kehilangan atau kerugian. Defendan, setelah bersetuju bahawa liabilitinya, jika ada, boleh dibuktikan tanpa perlu membuktikan kehilangan atau kerugian, tidak boleh menghujah dalam pembelaannya bahawa plaintif harus pula membuktikan kehilangan atau kerugian.

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd [1999] 3 CLJ 231 CA ***(refd)***

Birmingham and District Land Company v. London and North Western Railway Company [1886] 34 Ch D 261 ***(refd)***

Krishnaswami Iyer v. Raghaviah Chetty AIR [1928] Mad 43 ***(refd)***

Lister v. Romford Ice & Cold Storage Co Ltd [1957] AC 555 ***(refd)***

Meghji Lakhamshi and Brothers v. Furniture Workshop [1954] AC 80 ***(refd)***

Montagu Stanley & Co v. JC Solomon Ltd [1932] 2 KB 287 ***(refd)***

Moschi v. Lep Air Services Ltd [1973] AC 331 ***(refd)***

Robb v. Green [1895] 2 QB 315 ***(refd)***

Vic Van Isle Construction Ltd v. School District No 23 (Central Okanagan) 69 ACWS (3d) 1051 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 74(1), 77

Courts of Judicature Act 1964, s. 68(1)(a)

Other source(s) referred to:

Eastern African (Appeal to Privy Council) Order of Council 1951, art. 3(a)

For the appellant - Lambert Rasa-Ratnam (Foo Joon Liang); M/s Lee Hishamuddin
For the respondent - M Rajenthirakumar (Hiu Yeat Fong); M/s Kumar & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-46-1995]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This is a tolerably plain case. It involves an elementary point of law. It is the main point in the case. It has to do with the distinction between a right to an indemnity and a right to damages. It is as a result of confusion between these two concepts that has resulted in this litigation. The facts relevant to the point are not in dispute. For convenience, I will refer to the parties in accordance with the title assigned to them in the court below. This is the plaintiff's appeal.

The plaintiff is a bank. At the material time, the defendant was the manager of the plaintiff's branch at Tanah Merah. Upon his engagement with the plaintiff, the defendant executed a fidelity contract. It is dated 16 June 1979. The relevant part of the promise made by the defendant reads as follows:

> I hereby agree that I will, during all the time that I continue in the employment of the Bank in any capacity, faithfully, diligently and carefully attend to the business of the Bank, and *to the best of my skill and ability perform all duties which may be required of me*, and observe and execute all such instructions or regulations as have been or may be given to me from time to time by any one in the employment of the Bank who may be set over me ... *that I will on demand pay and make good to the Bank the amount of all loss, damage and expense which may be sustained or incurred by the Bank by or through the non-fulfilment of any of the obligations hereinbefore contained, or by or through any act, neglect or default done, permitted, or suffered by me at any time while I continue in the employment of the Bank.* (emphasis added.)

It is the plaintiff's case that the defendant has committed three breaches of his contractual duty. First, the defendant approved loans for joint borrowers who were not family members when there was a standing instruction that he was not to do so. Second, he failed to comply with the condition that the limit of a loan should be gradually reduced. Third, he breached his implied contractual duty of care and skill by grossly over-valuing property offered by customers as collateral to loans advanced by the plaintiff. The plaintiff goes on to claim that it has failed in its efforts to recover the loans advanced in consequence of defendant's breach of duty.

The plaintiff brought an action to recover the loss it suffered by reason of the defendant's breach of contract. The learned judge found that the defendant was in breach of contract. In making this finding, the learned judge acceded to the submission by plaintiff's counsel that the defendant had breached an implied term as to care and skill. The judge nevertheless dismissed the plaintiff's claim on the ground that the plaintiff had not proved its losses.

Before addressing the arguments on the main point in this case, there is one matter that I find convenient to deal with here. It concerns the question about the implied term urged by the plaintiff and, as I have said, accepted by the learned trial judge. In support of its argument for implying a term in the defendant's contract of employment, counsel for the plaintiff cited *Lister v. Romford Ice & Cold Storage Co Ltd* [1957] AC 555. That case affirmed earlier authority which supported the proposition that it was to be implied in a contract employment that the employee will carry out his duties with good faith and fidelity (*Robb v. Green* [1895] 2 QB 315) and that he would exercise reasonable care and skill in the performance of his duties (*Harmer v. Cornelius* [1858] 141 ER 94).

It is now settled law that the relationship between an employer and his employee is one founded on contract. As Lord Radcliffe said in his famous dissent in *Lister v. Romford Ice & Cold Storage Co Ltd*:

> Since, in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.

The relationship between an employer and employee being contractual, it is subject to the general principles governing the implication of a term in a contract. One such principle is that a term will not be implied if there is no necessity to do so. And the test of necessity is not met where the contract already contains a clear express stipulation to the same effect as that sought to be implied. As Gibbs J said when delivering the judgment of the British Columbia Court of Appeal in *Vic Van Isle Construction Ltd. v. School District No. 23 (Central Okanagan)* 69 ACWS (3d) 1051:

> There is a constant theme running through implied term cases and that is that a term will not be implied in the absence of necessity being shown. For a discussion of the necessity factor see p. 429 *et. seq. of Canadian Pacific Hotels v. Bank of Montreal* [1987] 40 DLR (4th) 385.

In the present instance, there is an express promise in terms of the one which the plaintiff seeks to have implied. Here, the defendant has expressly promised that he will – to quote from the contract in this case – "to the best of my skill and ability perform all duties which may be required of me". There is therefore no necessity to imply a term to the identical effect. For, it is a principle of great antiquity that a court will not act in vain. It is therefore my judgment that the submission of learned counsel for the plaintiff on this point is without merit. With that I now turn to the principal issue in this case.

To recall, what the defendant promised the plaintiff in this case is that he would – again to quote from his contract – "on demand pay and make good to the bank the amount of all loss, damage and expense which may be sustained or incurred by the bank by or through the non-fulfilment of any of the obligations hereinbefore contained, or by or through any act, neglect or default done, permitted or suffered by me". Learned counsel argues that on its true construction this promise is an indemnity and is not a mere warranty. The distinction is important.

In the case of a promise which is a warranty (which expression I use to denote a situation where a promisor warrants that he will perform or abstain from performing something), a breach thereof gives rise to a right to damages as an incident of the contract. Put another way, the duty of the promisor to

perform the primary obligations under the particular contract is by implication of law substituted with a duty to pay damages *in lieu* of such performance. See, *Moschi v. Lep Air Services Ltd* [1973] AC 331; *Abdul Razak bin Datuk Abu Samah v. Shah Alam Properties Sdn Bhd* [1999] 3 CLJ 231. Liability for breach is therefore strict and is not dependent upon proof of fault or damage. The innocent party is, subject to the rules as to remoteness, entitled to recover damages from the contract breaker. Even if the innocent party has in fact suffered no damages, it is entitled to recover at least nominal damages. So, if X warrants that he will mow Y's lawn for RM100 and he fails to perform, Y may recover damages from X for the non-performance of his warranty. If it cost Y RM90 to get Z to do the work, he can still recover damages for breach of contract from X for the inconvenience of finding Z to do the work, though he may only recover nominal damages.

But a contract of indemnity is very different. By definition, it is a contract "by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person". See, s. 77 Contracts Act 1950. In consequence, a promisee in a contract of indemnity must prove that he or she has suffered loss before he or she may succeed. In other words, loss is an essential ingredient of the cause of action whereas it is not so in an action for the breach of a warranty.

This elementary but important difference between a warranty and an indemnity is adverted to in several decided cases. In *Montagu Stanley & Co v. JC Solomon Ltd* [1932] 2 KB 287, the plaintiffs were stockbrokers and members of the Stock Exchange. The defendants were also stockbrokers but not members of the Stock Exchange. The plaintiffs and the defendants entered into a written agreement under which the defendant agreed that in consideration of receiving 50% of any commission on business introduced by them to the plaintiffs they would be liable for 50% of any "loss sustained" by the plaintiffs in connection with such business. The defendants introduced one Whitburn to the plaintiffs. Whitburn, through his transactions became indebted to the plaintiffs. He executed a deed of assignment of his property for the benefit of his creditors to which the plaintiffs and defendants assented. The plaintiffs claimed they had suffered a loss on the execution of the deed of assignment within the meaning of the agreement they had with the defendants. An action brought by them to recover 50% of the debt was dismissed by Horridge J. An appeal to the Court of Appeal failed. Greer LJ said:

> All that was agreed was that the defendants would be liable to the plaintiffs for 50 per cent of any loss sustained by them. Two points of time were put forward by the plaintiffs as the dates on which they say a loss was sustained by them, first, the date of the payment becoming due from the client to them

as brokers and the payment not being made. That seems to me to be unarguable. Many debtors fail to pay on the due date, but it cannot be said that the money not then paid is lost money. Secondly, it is said that the date when the loss was sustained was that on which the deed of July 30, 1931, was executed. What the plaintiffs thereby took was not something of no value but was something that was regarded by them as of more value than the right to sue the debtor. It is impossible to say that, because the money debt has been converted by the creditor into the acceptance of something valuable, the whole debt has thereby been lost, that is to say, that there has been a complete loss of the amount of the money owing. Assume that the brokers had accepted from the client, in place of their debt, the client's house or other property which might not be saleable at the moment but would be saleable at some future time with a reasonable expectation of reducing the amount of the debt. Could it be said that at the date on which the property was accepted in exchange for the debt there had been a loss sustained of the total amount of the debt? To me it seems quite impossible. Although it is not necessary in this case to decide the point, I think that if the result of what has happened is that the plaintiffs have to give up any interest on their money for a long time, the loss of that interest might be a 'loss sustained' in connection with the business and might give a right to recover it. That, however, is not the case with which we are concerned. The plaintiffs say they have lost the whole amount of the debt. My difficulty has been to appreciate that such a point is arguable. Horridge J was obviously right, and the appeal must therefore be dismissed.

In the same case, Slesser LJ said:

The agreement under consideration is in two parts, first, an obligation by the plaintiffs to pay to the defendants 50 per cent of the commission received on business introduced by the defendants. So far it is an ordinary agency agreement. Then there is a second limb which says that the defendants shall be liable for 50 per cent of any loss sustained by the plaintiffs. It is not an express agreement to answer for the debt of another but an agreement to indemnify against loss which may occur. That being so, it is incumbent on the plaintiffs to show that a loss has been sustained in connection with the business. No attempt was made to prove such a loss, no evidence being adduced. The plaintiffs rely on the execution of the deed of assignment by Colonel Sofer Whitburn to show that there has been a total loss; but we do not know that under the terms of that deed the whole or a great part of the money may not yet be obtained. All these matters are left in complete obscurity, and the plaintiffs have failed to show any present loss sustained by them under the agreement. The condition of liability not having been satisfied the claim fails and the appeal must be dismissed.

In *Birmingham & District Land Co v. London and North Western Railway* [1886] 34 Ch. D 261, Bowen LJ adverted to the distinction as follows:

> But it is quite clear to my mind that a right to damages, which is all that the Defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.

And in the same case, Fry LJ said:

> Now in my view the word 'indemnity' in the rule which we have now to construe, means to express a direct right either at law or in equity to indemnity as such, and I think that this right has to be contrasted, and not to be for a moment confounded, with the right to damages which arises either from a breach of contract or from tort. Let me take in the first instance the case of a breach of contract. A breach of contract gives rise, or may give rise, to a right to damages, but those damages are not the subject of the contract. They arise from the breach of the contract, and therefore they are in no sense the subject of the contract itself. When a man contracts that he will do a thing, it can hardly be taken as implying a contract as to what will arise if he does not do the thing. In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do a wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everybody has to damages for a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity, although when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages.

Lastly, in *Krishnaswami Iyer v. Raghaviah Chetty* AIR [1928] Mad. 43, Venkatasubba Rao J said:

> Now in the case of contracts, right to indemnity must be carefully distinguished from right to damages. A right to indemnity is given by the original contract, whereas a right to damages arises in consequence of the breach of that contract. These two rights are confounded and one reason for the confusion is that when a contract is broken, indemnity is often found to coincide with the measure of damages. In these cases, whether the right is called right to indemnity or right to damages, practically the same result follows, and it is forgotten that these two words express two fundamentally different legal ideas.

In the case before us, if you take the words of the promise made by the defendant and already quoted in para. 9 of this judgment and test them against the definition in s. 77 of the Contracts Act, it is clear as crystal that the defendant has promised to save the plaintiff from loss caused to the plaintiff

by the conduct of the defendant himself. In the words of Venkatasubba Rao J in *Krishnaswami Iyer v. Raghaviah Chetty*, this is "a right to indemnity is given by the original contract" and not a mere right to damages. Accordingly, it is my judgment that upon its true construction, the defendant's promise in this case is an indemnity.

It follows from what I have said thus far that it was imperative for the plaintiff bank to prove that it suffered the losses alleged in its pleaded case. That is what the learned judge held: and I am in agreement with him. It is common ground that the plaintiff did not prove its losses.

During argument, learned counsel for the plaintiff has repeatedly relied on the fact that at the commencement of the trial, both sides agreed that the issue of liability should be tried first and that the issue as to damages should be left to be dealt with later. Meaning no disrespect to learned counsel, his repetitious submission has left me unimpressed. In my judgment, it is not of moment that this was, to borrow the expression used by counsel, "a split trial". In the course of proving the defendant's liability, it was incumbent on the plaintiff to establish its loss as an essential ingredient of its cause of action. Once, as found by the learned judge, the loss went unproved, the plaintiff's cause of action against the defendant was not established. On the facts of this case, the learned judge was well entitled to come to the conclusion that he did.

One last point. There are two motions before us. There is the plaintiff's motion to admit the sealed order. This is a formality and I would grant an order in terms of that motion. There is also the defendant's motion to dismiss this appeal for failure on the part of the plaintiff to obtain leave to appeal on the ground that the subject matter was below the limit RM250,000 fixed by s. 68 of the Courts of Judicature Act 1964. As I indicated during argument, this is a frivolous application lacking any merit. The value of a claim, in the context of s. 68(1)(a) is to be viewed from an appellant's standpoint. Here, the pleaded value of the plaintiff's claim exceeds the statutory trigger.

In *Meghji Lakhamshi and Brothers v. Furniture Workshop* [1954] AC 80, the Board of the Privy Council was concerned with art. 3(a) of the Eastern African (Appeal to Privy Council) Order of Council 1951, which provided that an appeal shall lie as a right from any final judgment of the Court of Appeal "where the matter in dispute on appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards." Upon a preliminary objection to jurisdiction, the Board held that leave to appeal had been rightly granted. Lord Tucker who delivered the advice of the Board said:

The article provides that an appeal shall lie as of right from any final judgment of the Court of Appeal 'where the matter in dispute on the appeal amounts to or is of the value of £500 sterling, or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards.' Leave was granted by the Court of Appeal for Eastern Africa on affidavits to the effect that the capital value of the plot in question exceeded £500. The respondents contended that the true test is how much it is worth to the appellants to succeed in the appeal, and that this is to be measured by deducting from the value of the land with vacant possession its value to the owners subject to the statutory tenancy, and that as no evidence of this had been adduced there was no jurisdiction to fix the conditions on compliance with which the final order giving leave to appeal would issue. It is quite possible that a case may fall in whole or in part within more than one limb of article 3 (a), and it will suffice for an appellant to show that it comes within any one. It was laid down by this Board in *Macfarlane v. Leclaire* [1862] 15 Moo PC 181 that *'the value of the subject-matter in dispute,' under corresponding legislation relating to Canadian appeals, must be determined by looking at the judgment as it affects the interests of the party who is prejudiced by it and who seeks to appeal.* The same test was applied in *Allan v. Pratt* [1888] 13 App. Cas. 780 to a case of an appeal from a judgment awarding damages for personal injuries, it being held that the value was the sum awarded and not the sum claimed. More recently in *Lipshitz v. Valero* [1948] AC 1 it was held that, where a tenant appellant had been evicted from a plot of land valued at £50 on which he had constructed a building at a cost of £450, the true test was whether it was worth £500 to him that the Rent Restriction Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which had cost him £450 to erect. The first two of these cases were dealing only with the value of 'the subject-matter in dispute,' and it would appear that in the last case also it was the first limb of the article which was, primarily at any rate, under consideration. *Their Lordships have no doubt that under whichever limb of the article any case may fall, the 'value' must be looked at from the point of view of the appellant,* with the result that an appeal may sometimes lie where the landlord is the appellant although there could be no appeal by the tenant, or *vice versa*.

So too here. As I have already said, the appealable limit fixed by s. 68(1)(a) must be viewed from an appellant's standpoint. I would therefore dismiss the defendant's motion and order that the costs of the motion be paid by the defendant to the plaintiff.

Before concluding, I must mention that the judgment under appeal is that of Mohd Saari Yusof J (later JCA). It is one of the last few of his judgments that we shall see in this court. He has since retired. Speaking for myself, I shall miss his simple and direct style of writing.

I now conclude as I began. This is a rather simple case. It has perhaps been made complex by the plaintiff's failure to appreciate the true nature of the promise it had extracted from the defendant. That failure has led to much confusion in its mind.

For the reasons already given, I would dismiss this appeal and affirm all the orders made by the learned trial judge. The appellant bank must pay the costs of this appeal. These costs will not include the costs of its motion to admit the sealed order of the High Court as part of the record of appeal. However, the respondent must pay the costs of its motion to be taxed on a separate bill. These costs are to be set off against the costs receivable by the respondent from the appellant.

My learned brother Abdul Kadir bin Sulaiman JCA has read this judgment in draft and agrees with the reasons and conclusions stated herein.

Abdul Aziz Mohamad JCA:

I too will refer to the appellant bank and the respondent as plaintiffs and defendant respectively.

The only point raised by the defendant's counsel in his oral submission in resisting this appeal is that the contract dated 16 June 1979 between the plaintiffs and the defendant and entitled Employee's Service Agreement was a contract of indemnity and that therefore in order to establish the defendant's liability in this case the plaintiffs must prove their losses, which they have not done.

The relevant parts of the contract have been read out by my learned brother, Gopal Sri Ram JCA. There are essentially two parts to the contract. The first part is essentially a promise by the defendant to serve the plaintiffs faithfully. The second part is a promise by the defendant – a pay-and-make-good promise – to compensate the plaintiffs for any loss suffered by them as a result of the defendant's failure to fulfil any of his promises in the first part. All these promises were made in consideration of the plaintiffs employing the defendant.

It was contended by the defendant's counsel, and this was not disputed by the plaintiffs' counsel, that the pay-and-make-good promise was a contract of indemnity as defined in s. 77 of the Contracts Act 1950 or was a promise that made the Employee's Service Agreement a contract of indemnity.

The defendant's counsel may be right in his sole point if the plaintiffs' claim in this case was a claim under a right to the indemnity given in the contract. But the plaintiffs' claim was not such a claim. It was a claim for breach of contractual duty of care. The plaintiffs chose to found their cause of action

not on the indemnity but on breach of contract and were seeking damages for breach of the defendant's contractual duty of care. The Employee's Service Agreement, but for the fact that it contained an indemnity clause, was an ordinary contract in which, for a consideration, the defendant made certain promises, that is, promises that amounted to a promise to serve the plaintiffs faithfully. A breach of that contract would constitute a cause of action for the plaintiffs. To establish liability the plaintiffs did not have to prove their losses or damages, the right to which would be a right consequential and incidental to the breach. For that right the plaintiffs could rely on the pay-and-make-good promise as an express stipulation of what the defendant would bear in consequence of the breach. Or if they could not rely on that promise they could rely on the consequential right to compensation given by s. 74(1) of the Contracts Act 1950, and they might get the same amount of compensation as the indemnity, because as Fry LJ stated in *Birmingham and District Land Company v. London and North Western Railway Company* [1886] 34 Ch. D 261 at p. 276, "when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages".

That the plaintiffs chose to found their action on breach of contract and not on indemnity is borne out by the manner in which their statement of claim was framed. It was framed as a claim for breach of contract and not as a claim of right to the indemnity. It set out the defendant's promises, then the defendant's breach, and ended by averring that as a result of the breach the plaintiffs suffered loss and damage.

It is true that because the plaintiffs, in setting out in their statement of claim the various promises of the defendant, also set out the pay-and-make-good promise, the defendant in para. 5 of his amended statement of defence contended that the plaintiffs could not rely on the pay-and-make-good promise until the plaintiffs had ascertained their ultimate losses. That must have been a defence that viewed the pay-and-make-good promise as an indemnity and that treated the plaintiffs' claim as one under the right to the indemnity. But as I said that was not the plaintiffs' claim.

At the commencement of the trial the parties agreed that the trial was only for determining the liability of the defendant, meaning that they agreed that it was a liability that did not require for its establishment proof of loss or damage. That was confirmed by the respondent's counsel at the end of the trial when he said, according to the judge's notes: "I agree plaintiff has not proved loss or damages which accrued to plaintiff because at the outset parties agreed this proceeding to determine liability only". That agreement is one of great significance as indicating that the defendant realized and accepted – and correctly too – that the plaintiffs' claim was one for breach of contract, the

establishment of which did not require proof of loss or damage. By that agreement the defendant impliedly abandoned his defence in para. 5 of his amended statement of defence. The defendant could not, while agreeing that his liability, if any, could be established without proof of loss or damage, continue to maintain that defence.

As I am of the view that the plaintiffs' claim was not a claim under a right to indemnity but was a claim for breach of contract, the sole point of the defendant has no basis, and for that reason I would allow this appeal and order damages to be assessed.

As to the two motions mentioned by my learned brother, they have already been disposed of during the hearing of the appeal. By a unanimous decision, the plaintiffs' motion was allowed and the defendant's motion was dismissed. There is nothing further to decide on the motions, except the costs in respect of the defendant's motion, as regards which we omitted to make any express order. I agree with my learned brother that the costs of that motion be paid by the defendant to the plaintiffs.